

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DEE R. KLOCK</b>	:	ORDER
	:	DTA NO. 819020
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 1998.	:	

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Petitioner, Dee R. Klock, 4295 Crackersport Road, Allentown, Pennsylvania 18104, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1998.

On August 23, 2002 the Division of Taxation, appearing by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), brought a Motion for Summary Determination seeking dismissal of the petition in the above-referenced matter, pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, on the ground that petitioner failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services within 90 days after the issuance of a Notice of Deficiency to petitioner. Petitioner, appearing *pro se*, did not respond to the Division of Taxation's motion. Accordingly the 90-day period for issuance of this order commenced on September 23, 2002<sup>1</sup> the date petitioner's time to serve a response to the Division's motion expired. Based upon the motion papers, the affidavits

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<sup>1</sup> The 30 days allowed for petitioner's response to the Division's motion expired on Sunday, September 22, 2002. Therefore, petitioner's response was due by September 23, 2002.

and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Daniel J. Ranalli, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Deficiency.

***FINDINGS OF FACT***

1. At issue on this motion is a Notice of Deficiency, dated October 22, 2001, addressed to petitioner, Dee R. Klock, at 4295 Crackersport Road, Allentown, Pennsylvania 18104-1904. The notice asserts additional New York State personal income tax for the year 1998 of \$1,252.72, plus interest of \$232.31, less assessment payments of \$1,300.00, for a current amount due of \$185.03.

2. Petitioner filed a Request for Conciliation Conference with the Division of Taxation's ("Division") Bureau of Conciliation and Mediation Services ("BCMS"). On March 4, 2002, BCMS received the request for a conciliation conference. The request is dated February 15, 2002 and was mailed by United States Postal Service ("USPS") Priority Mail bearing a USPS postmark of February 27, 2002.

3. On March 15, 2002, BCMS issued a Conciliation Order Dismissing Request (CMS No. 190877) which stated as follows:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on October 22, 2001, but the request was not mailed until February 27, 2002, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

4. Notices of deficiency, such as the one at issue herein, are computer-generated by the Division's Case and Resource Tracking System ("CARTS") Control Unit. The computer

preparation of such notices also includes the preparation of a computer printout entitled “ASSESSMENT RECEIVABLE, CERTIFIED RECORD FOR NON-PRESORT MAIL,” known commonly as a certified mail record (“CMR”). The CMR lists those taxpayers to whom notices of deficiency are being mailed and also includes, for each such notice, a separate certified control number.

5. Each computer-generated notice of deficiency is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading “CERTIFIED NO.” The CMR lists an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The printing date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the CMR lists a printing date of “10/12/01,” which has been manually changed to “10/22/01.” The pages of the CMR remain connected to each other before and after acceptance of the notices by the USPS through return of the CMR to the CARTS Control Unit.

6. Statutory notices of deficiency that are ready to be mailed to taxpayers are placed in the Division’s Mail Processing Center “Outgoing Certified Mail” area, together with the CMR listing such notices. A Mail Processing Center employee operates a machine which places each statutory notice into an envelope, weighs and seals the envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then reviews the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking

the envelopes against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the USPS located in the Albany, New York area, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and either his or her initials or signature to the CMR. The Division has also specifically requested that the USPS indicate the specific total number of pieces of mail received by either writing the number on the CMR or by circling such preprinted number on the CMR.

7. In the ordinary course of business, a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

8. The CMR relevant to this matter is a 10-page, fan-folded (connected) computer-generated document entitled “ASSESSMENT RECEIVABLE, CERTIFIED RECORD FOR NON-PRESORT MAIL.” The 20-digit certified control numbers on the CMR do not run sequentially. Each page contains 11 entries, with the exception of the last page (Page 10) which contains 3 entries. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 10 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee and postage and fee amounts.<sup>2</sup>

9. Information regarding the Notice of Deficiency at issue is contained on page nine of the CMR described above. Specifically, corresponding to certified control number 7104 1002 9739

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<sup>2</sup> The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

0050 1993 is notice number L-019638787, along with petitioner's name and the address, 4295 Crackersport Rd, Allentown, PA 18104-1904.

10. Each page of the foregoing CMR bears the postmark of the Colonie Center Branch of the USPS, dated October 22, 2001.

11. The last page of the CMR, page 10, contains a preprinted entry of 102 corresponding to the heading "Total Pieces and Amounts Listed." This figure has been manually circled and below it, next to the USPS postmark, is the signature or initials of a Postal Service employee.

12. Appearing immediately below the "total pieces" listing is the heading "Total Pieces Received at Post Office." No information appears after this heading.

13. The affixation of the Postal Service postmark, the signature or initials of the Postal Service employee, and the circling of the "total pieces listed" figure indicate that all 102 pieces of mail listed on the CMR were received at the post office.

14. The facts set forth above in Findings of Fact "4" through "13 " were established through affidavits of Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties include supervising the processing of notices of deficiency. Mr. Baisley is employed as a Principal Mail and Supply Clerk in the Division's Mail Processing Center. Mr. Baisley's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

15. The fact that the Postal Service employee circled the total number of pieces listed on the CMR to indicate that this was the number of pieces received was established through the affidavit of Mr. Baisley. Mr. Baisley's knowledge of this fact is based on his knowledge that the Mail Processing Center requested that Postal Service employees either circle the number of

pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

16. The Division generally does not request, demand or retain return receipts from certified or registered mail.

17. Ms. Mahon appended to her affidavit as Exhibit “B” a Notice of Deficiency issued to petitioner. She attests that Exhibit “B” is “a true and accurate copy of the Notice of Deficiency mailed to the petitioner, Dee R. Klock, on October 22, 2001.” (Mahon Affidavit ¶ 10).

18. Exhibit “B” consists of two documents. The first document is a copy of a two-sided document (Form DTF - 997 [6/99]) containing the Division’s Central Office Income Tax Audit Division’s Albany, New York address, certified mail control number 7104 1002 9739 0050 1993 and the corresponding certified bar code and petitioner’s name and mailing address, “KLOCK - DEE R, CRACKERSPORT RD, ALLENTOWN, PA 18104-1904” on the upper third of its front side and printed information pertaining to ways to obtain answers to questions and private delivery services on the back side. The record is silent as to the identity of its creator or the purpose of this document. The second document is a copy of a Notice of Deficiency (Form DTF-962F [9/95]), addressed to petitioner, Klock - Dee R., 4295 Crackersport Rd., Allentown, PA 18104-1904; bearing assessment identification number L-019301444. The certified control number does not appear on the Notice of Deficiency.

19. Attached to the Division’s motion papers is a copy of the first two pages of the 1999 Nonresident and Part-Year Resident Income Tax Return (“Form IT-203”) filed by petitioner and his wife, which was signed by petitioner and his wife and dated March 11, 2000. Petitioner’s address on the return is the same as it is on the Notice of Deficiency at issue and on the CMR, to wit, 4295 Crackersport Road, Allentown, PA 18104.

20. Also attached to the Division's motion papers is a document entitled "PIT - RETURNS PROCESSING, TAXPAYER SELECTION" ("PITSEL") that lists, among other things, petitioner's social security number and name. In his affidavit, John Matthews explains that the printout of the PITSEL computer screen indicates that petitioner's 1999 tax return is the most recent return on file.

21. As noted above, petitioner did not respond to the motion for summary determination.

### ***CONCLUSIONS OF LAW***

A. A motion for summary determination may be granted,

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

The proponent of a summary determination motion must make a prima facie showing of entitlement to a determination in its favor, submitting sufficient evidence to demonstrate the absence of any material issues of fact (*see, Alvarez v. Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 925; *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 487 NYS2d 316). The burden is then placed on the opponent of the motion to present facts sufficient to demonstrate an unresolved material issue which can be determined at a hearing (*Walski v. Forma*, 54 AD2d 776, 387 NYS2d 538). Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004). Because it is the "procedural equivalent of a trial" (*Crowley's Milk Co. v. Klein*, 24 AD2d 920, 264 NYS2d 680, 682) undermining the notion of a "day in court," summary determination should be used cautiously (*Wanger v. Zeh*,

45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). Guided by these principles, I deny the Division's motion for summary determination.

B. A petition contesting a notice of deficiency of personal income tax must be filed within 90 days after the mailing of the notice by certified mail to the taxpayer's last known address (Tax Law § 681[a],[b]; § 689[b]). As an alternative to filing a petition in the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

When, as here, the Division brings a motion for summary determination on the ground that the request for a conciliation conference was not made within a statutory time limit, it bears the initial burden of proving when the applicable time limit began by establishing the date of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.* Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered to the custody of the United States Postal Service (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

The Division is not required to produce employees who personally recall the mailing of each individual notice of deficiency. Rather, the act of mailing may be proven by evidence of the Division's standard mailing procedure, corroborated by direct or documentary evidence of actual mailing (*e.g.*, *Matter of Roland*, *supra*; *Matter of Air Flex Custom Furniture*, *supra*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, *supra*). A properly completed Postal Form 3877, reflecting USPS receipt of the items on the form, represents direct documentary evidence of the date and fact of mailing (*Matter of Air Flex Custom Furniture*, *supra*; *see also*,



*Coleman v. Commr.*, 94 TC 82; *Wheat v. Commr.*, T.C. Memo 1992-268, 63 TCM 2955). The United States Tax Court has held that “precise compliance” with the Postal Service Form 3877 mailing procedures serves two purposes in addition to providing direct evidence of mailing: (1) “A properly completed postal service Form 3877 also reflects compliance with IRS established procedures for mailing deficiency notices” and (2) the properly completed form raises a presumption of official regularity (*Wheat v. Commr.*, *supra* at 2958). If the Division elects not to use a properly completed Postal Service Form 3877 as its direct evidence of mailing, it is required to provide evidence otherwise sufficient to prove both the fact and date of mailing (*Matter of Greene Valley Liquors*, Tax Appeals Tribunal, November 25, 1992).

C. In the instant matter, the Division relies on a copy of the computer-generated certified mail record. This 10-page CMR lists 102 certified control numbers with corresponding names and addresses. There are no deletions from the list. Petitioner’s name and address appear on page 9 of the CMR. All 10 pages of the CMR bear a USPS postmark dated October 22, 2001. Additionally, a postal employee circled the entry “102” next to the “TOTAL PIECES AND AMOUNTS LISTED” heading and signed or initialed the CMR to indicate receipt by the post office of all pieces of mail listed thereon.<sup>3</sup> This CMR, containing most of the significant elements of Postal Service Form 3877, proves that an item was mailed to petitioner on October 22, 2001. However, the Division cannot rely on this CMR to prove the fact of mailing of any particular notice of deficiency or to create a presumption of official regularity.

There is a gap in the general procedures for producing and mailing statutory notices set forth in Ms. Mahon’s affidavit. While Ms. Mahon’s affidavit states that the certified control

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<sup>3</sup> This fact was established through the affidavit of Mr. Baisley which specifically set forth the basis of Mr. Baisley’s knowledge for this proposition (*cf.*, *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

number assigned to each computer-generated notice of deficiency is recorded on the CMR under the heading “Certified No.,” she fails to identify the additional document on which that certified control number is recorded. The absence of this information from the standard procedures makes it impossible to cross-reference each notice with the certified control number assigned to it and appearing on the CMR. Therefore it is impossible to determine exactly what was mailed.

As part of its documentary evidence to prove actual mailing, the Division submitted Exhibit “B,” a copy of the Notice of Deficiency allegedly mailed to petitioner on October 22, 2001. The Mahon affidavit is inconsistent with Exhibit “B.” Geraldine Mahon states in a sworn affidavit that the Notice of Deficiency mailed to petitioner bears assessment identification number “L-019638787” and certified control number “7104 1002 7939 0050 1993” and that the document appended to her affidavit as Exhibit “B” is a true and accurate copy of that notice of deficiency. Contrary to Ms. Mahon’s assertion in her affidavit, Exhibit “B” consists of two documents, not one. The first document is a Form DTF-997 (6/99) that bears, among other things, the certified control number “7104 1002 9739 0050 1993” and petitioner’s name and address. The purpose of this form is not set forth in either the Mahon affidavit or the Baisley affidavit. The second document, the Notice of Deficiency, bearing assessment identification number L-019638787, does not bear a certified control number. Either Ms. Mahon did not compare the Notice of Deficiency appended as part of Exhibit “B” with the Notice of Deficiency issued to petitioner, and therefore her certification of authenticity is without value, or the copy she compared with the Notice of Deficiency issued to petitioner was subsequently altered. In either case, Exhibit “B” cannot be a true and accurate copy of the Notice of Deficiency issued to petitioner. As such, there is no proof that the article of mail mailed to petitioner contained the

Notice of Deficiency. Therefore, there are factual issues to be resolved and the Division has not proved mailing of a Notice of Deficiency to petitioner on October 22, 2001.

D. The motion of the Division of Taxation is denied. The matter will be scheduled for a hearing limited to the issue of the timeliness of petitioner's request for a conciliation conference.

DATED: Troy, New York  
December 19, 2002

/s/ Daniel J. Ranalli  
ADMINISTRATIVE LAW JUDGE